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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-869

UNITED STATES OF AMERICA,
Petitioner,

vs.

UNITED CONTINENTAL TUNA CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR THE RESPONDENT.

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BRIEF FOR THE RESPONDENT.

I

Statement of the Case.

Respondent United Continental Tuna Corporation (hereinafter "Tuna Corporation") was organized in 1969 by eight United States citizens of Missouri and Arkansas, who together owned 99.5% of the company's stock (A.13). Tuna Corporation was incorporated under the laws of the Republic of the Philippines for the purpose of enabling the company to operate a fishing vessel in the Philippine Islands. The company was organized by these United States citizens in accordance with the 1962 Revenue Act, 26 U.S.C. 1248, which extended tax benefits and other incentives to United States citizens to encourage them to invest in the Re-

public of the Philippines and other under-developed countries.

In late 1969, Tuna Corporation, with funds furnished by its United States shareholders, purchased a vessel, the M.V. ORIENT, in San Pedro, California. Tuna Corporation spent approximately one million dollars in San Pedro purchasing and fitting out ORIENT (A.7).

On December 1, 1969, ORIENT sailed on its maiden voyage, bound from California to the Philippines. After proceeding only 70 miles from San Pedro, and while near San Nicolas Island, California, ORIENT was rammed by a negligently-operated U.S. Navy missile frigate, the U.S.S. PARSONS (A.6). ORIENT's hull was severely ruptured below the water line, as a result of which she sank within minutes. ORIENT and all equipment on board were lost. By reason of the sinking, the American shareholders of Tuna Corporation have suffered a loss of approximately one million dollars (A.7).

II

Questions Presented.

Petitioner, United States, seeks review of the basis upon which the Court of Appeals decided the case in Tuna Corporation's favor, *i.e.*, that a claim for damage caused by a public vessel of the United States will lie under the Suits in Admiralty Act, 46 U.S.C.A. 741 *et seq.* (hereinafter "SIA") as amended in 1960.

Since the Court of Appeals ruled in Tuna Corporation's favor on this issue, it was unnecessary for that court to rule upon, and it did not rule upon, Tuna Corporation's alternative argument that it is entitled in any event to recover under the Public Vessels Act, 46

U.S.C.A. 781 *et seq.* (hereinafter "PVA"), because Tuna Corporation is a United States shipowner not affected by the reciprocity clause, 46 U.S.C.A. 785, and, moreover, because that reciprocity clause is unconstitutional in that it denies equal protection of the laws to certain aliens. Tuna Corporation respectfully requests that, if this Court reverses the Court of Appeals on the SIA issue, it consider its alternative theory of recovery under the PVA.

III

Summary of Argument.

Tuna Corporation and its American shareholders are innocent victims of the Government's negligence. There is no equitable reason why the United States should not be compelled to stand trial for this tort, just as would any private shipowner. The United States frequently sues private shipowners, including Filipinos, for damage they cause to United States public vessels.[1] The United States should be compelled in this action to respond reciprocally for the damage its public vessel caused.

The Government defends upon the basis that it has sovereign immunity and can only be sued by those persons it selects and only for those torts it selects. It states it has not agreed to be sued by Filipino shipowners, even though it sues Filipinos for the same type of damage. As appears hereinafter, this defense of governmental immunity, upon which the United States relies, is in total disrepute. In the past fifteen years it has been judicially abrogated by eighteen State

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[1]As an example, see *United Philippine Line, Inc. v. Submarine USS DANIEL BOONE*, 475 F.2d 478 (4th Cir. 1973).

Supreme Courts as well as the District of Columbia and has been legislatively abolished in many other states.

Tuna Corporation's action will lie within the legislative framework created by Congress and, specifically, under the SIA as amended in 1960, which plainly and unequivocally provides that "In cases where if such vessel were privately owned or operated, . . . a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States. . . ." The reciprocity clause of the PVA, upon which the Government relies, does not apply to actions filed under the SIA. Accordingly, Tuna Corporation is entitled to sue under the SIA. Any ambiguity in the SIA, and there is none, is to be liberally resolved against the sovereign.

Moreover, Tuna Corporation can sue the United States under the PVA. In admiralty matters, the state in which a shipowner is incorporated is disregarded, and his citizenship determined by the residence of its shareholders and its principal place of business, which in this instance is the United States. In short, Tuna Corporation is treated, under the admiralty law, as an American shipowner and the reciprocity clause does not prevent it from suing the United States under the PVA. Even if Tuna Corporation were treated as a Philippine citizen, which it should not be, the reciprocity clause still would not prevent a Philippine shipowner from recovering for Government negligence under the PVA for the reason that the reciprocity clause is void as a blatant unconstitutional denial to Filipinos of equal protection of the laws.

IV

Sovereign Immunity: An Historical Anachronism.

There is no act of Congress nor constitutional provision insulating the United States from liability for negligently sinking ORIENT. The Government's defense is that the United States has not consented, in the PVA or SIA, to be sued for such liability and, in the absence of such consent, the United States cannot be sued. In other words, the Government's defense is the judicially created doctrine of sovereign immunity. This is surely a defense concerning which, as the Government has noted, "a page of history is worth a volume of logic."[2]

Sovereign immunity originated as a personal prerogative of the King of England.[3] In the feudal society, the lord of the manor was not subject to suit in his own courts, and the King, the highest feudal lord, enjoyed the same protection in his courts.[4] Until the 16th century the prerogative of the King was purely personal, but then a metaphysical concept emerged that converted the personal prerogative of the King into the sovereign immunity of the state.[5]

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[2]Gov. Br. 9; *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

[3]For a detailed history of sovereign immunity see: *Muskopf v. Corning Hospital Dist.*, 55 Cal.2d 211, 359 P.2d 457 (1961); Borchard, *Governmental Responsibility for Tort*, 34 Yale L.J. 129; Casner and Fuller, *Municipal Tort Liability in Operation*, 54 Harv. L. Rev. 437; Yankwich, *Problems Under the Federal Tort Claims Act*, 9 FRD 143.

[4]1 Pollock and Maitland, *The History of English Law* [1909 ed.] at pp. 512-517; 3 Holdsworth, *History of English Law* [1922 ed.] 462.

[5]Watkins, *The State As Party Litigant*, 11 [Johns Hopkins University Studies in History and Political Science, Series XLV, No. 1 (1927)]; 4 Holdsworth, *History of English Law, supra*, at pp. 190-197.

In England, nevertheless, that concept did not operate as a total denial of relief to the victims of the King's negligence. It only denied jurisdiction to claimants in the King's courts, since those courts could not have jurisdiction over the King. There was jurisdiction, however, in the Court of Exchequer for equitable relief against the Crown.[6] The method for obtaining relief in that court was the petition of right. It was unthinkable that the King would invoke his prerogative in the Court of Exchequer, since "it would derogate from the King's honour to imagine that what is equity against a common person should not be equity against him." It was freely acknowledged that to the petition "there must always be a reply: 'Let right be done' ".[7] The petition of right, accordingly, was a definite legal remedy against the Crown. In addition to the petition, a claimant always had the right to sue the king's officers personally, and from the earliest times those officers had to have sufficient financial standing to make the remedies against them meaningful.[8]

How the English practice became the basis for a rule in the United States that federal and state governments did not have to answer for their torts has been called "one of the mysteries of legal evolution". Borchard, *Governmental Responsibility in Tort,* 34 Yale L.J. 1, 4. The misconception of English precedents apparently began in 1821 when Marshall, in *Cohens v. Commonwealth of Virginia,*[9] opined without explanation that "The universally received opinion is, that no suit can be commenced or prosecuted

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[6]*Muskopf v. Corning Hosp. Dist., supra,* 214-15.

[7]*Id.*

[8]*Id.*

[9]6 Wheat. 264, 411-12, 5 L.Ed. 257, 293 (1821).

against the United States; that the judiciary act does not authorize such suits." Thus, the English doctrine of sovereign immunity, which did not operate to prevent claimants from recovering, achieved in the United States a harshness which never could be rationalized. Congress over the years has ameliorated the judicially-created doctrine with private bills and with piecemeal remedial legislation and the courts, in recognition of its gross inequity, have judicially created numerous exceptions to the doctrine.[10]

Few doctrines in the law have sustained such voluminous, searching and nearly unanimous attack as the American judicially-created principle that government should not respond in damages for their torts except where it has consented to do so.[11] The old rationalization that "it is better than an individual should sustain an injury than that the public should suffer an inconvenience" runs counter to both the traditional tort principle that *vis-a-vis* the innocent victim the wrongdoer should pay, and modern tort concepts of risk distribution and cost allocation.[12] At this time, no less than

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[10]See *United States v. Yellow Cab Co.,* 340 U.S. 543, 548-49 (1950) concerning the hundreds of private relief acts passed by each Congress to compensate parties for the negligence of Government employees. Congressional acts ameliorating sovereign immunity included The Tucker Act of March 3, 1887 [28 U.S.C. 1346(a)(2)], the Patent Infringement Act of June 25, 1910 [28 U.S.C. 1498], the SIA, the PVA, the Oyster Bed Damage Act of August 30, 1935 [28 U.S.C. 1497], and the Federal Tort Claims Act of August 2, 1946 [28 U.S.C. 1346(b)]. The courts judicially mitigated the harshness of the doctrine by creating the governmental-proprietary distinction and other exceptions. See *Spencer v. General Hosp. of Dist. of Columbia,* 425 F.2d 479, 485 (D.C. Cir. 1969).

[11]*Spencer v. General Hosp. of Dist. of Columbia, supra,* 486-87.

[12]*Id.,* 218-19.

18 State Supreme Courts have judicially abrogated governmental immunity and it has been legislatively abolished or severely altered in at least 23 more states.[13]

[13]States judicially abrogating governmental immunities include Alaska, *Scheele v. City of Anchorage*, 385 P.2d 582 (Alas. 1963); Arizona, *Veach v. City of Phoenix*, 102 Ariz. 195, 427 P.2d 335 (1967); California, *Muskopf v. Corning Hosp. Dist., supra;* Colorado, *Evans v. Bd. of County Comm'rs.*, 147 Colo. 97, 482 P.2d 968 (1971); Florida, *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1957); Idaho, *Smith v. State*, 93 Ida. 795, 473 P.2d 937 (1970); Illinois, *Molitor v. Kaneland Comm. Unit. Dist.*, 18 Ill.2d 11, 163 N.E.2d 89 (1959), cert. den. 362 U.S. 968; Indiana, *Campbell v. State*, ... Ind. ...., 284 N.E.2d 733 (1972); Kentucky, *Haney v. City of Lexington*, 386 S.W.2d 738 (Ky. 1964); Louisiana, *Bd. of Comm'rs of Port of New Orleans v. Splendour Shipping & Enterprises Co., Inc.*, 273 So.2d 19 (La. 1973); Michigan, *Williams v. City of Detroit*, 364 Mich. 231, 111 N.W.2d 1 (1961); Minnesota, *Spanel v. Mounds View School Dist.*, 264 Minn. 279, 118 N.W.2d 795 (1962); Nebraska, *Johnson v. Municipal Univ. of Omaha*, 184 Neb. 512, 169 N.W. 2d 286 (1969); Nevada, *Rice v. Clark County*, 79 Nev. 253, 382 P.2d 605 (1963); New Jersey, *Willis v. Dept. of Conservation & Econ. Dev.*, 55 N.J. 534, 264 A.2d 34 (1970); Pennsylvania, *Ayala v. Philadelphia Bd. of Public Ed.*, 453 Pa. 584, 305 A.2d 877 (1973); Rhode Island, *Becker v. Beaudoin*, 106 R.I. 562, 261 A.2d 896 (1970); and Wisconsin, *Holytz v. City of Milwaukee*, 17 Wis.2d 26, 115 N.W.2d 618 (1962). See, also, District of Columbia, *Spencer v. Gen. Hosp. of Dist. of Columbia, supra.* Seven state legislatures have legislatively abolished the doctrine; Hawaii, Hawaii Rev. Stat. §662-1 to 662-15 (1968); Iowa, Iowa Code Ann. §25 A.1 to 25 A.20 (1967); New York, N.Y. Ct. Cl. Act §8 (1963); Oklahoma, Okla. Stat. Ann., Tit. 11, §30.260-300 (1973); Utah, Utah Code Ann., §63-30-1 to 63-30-34 (1968); and Washington, Wash. Rev. Code Ann., 4.92.090 (1972). Partial abolition has legislatively occurred in six other states; Connecticut, Conn. Gen. Stat, Rev. §4-141 et seq. (1966); North Carolina, N.C. Gen. Stat. § 143-291 *et seq.* (1964); South Carolina, S.C. Code Ann. §10-2621 *et seq.* (Supp. 1971); Tennessee, Tenn. Code Ann. §9-812 to 814 (1955); Texas, Tex. Rev. Civ. Stat. Ann., art. 6252 (1970); West Virginia, W. Va. Code Ann. §8-12-7(b) (1969). Seven other states have authorized the purchase of insurance and submit themselves to suit: Georgia, Ga. Code Ann. §56-2437 (1971); Kansas, Kan. Stat. Ann., §74-4715-16 (1971); Maine, Me. Rev. Stat. Ann., Tit. 14, §157 (1972); Montana, Mont. Ann. Stat. §226.092 (1972); New Hampshire, N.H. Rev. Stat. Ann. §412.3 (1968); New Mexico, N.M. Stat. Ann. §5-6-18 to 22 (1966); North Dakota, N.D. Cent. Code §39-01-08.

The doctrine survives, if at all, only as a result of inertia.

Some courts have been reluctant to judicially abolish the doctrine, believing it should be done by the legislature. The vast majority of courts which have recently considered abrogation, however, have concluded that there should be no judicial reluctance to abolish a judicially-created rule when it is obvious the rule is inequitable.[14] This court recently expressed a similar view in *United States v. Reliable Transfer Co., Inc.*, ... U.S. ...., 43 L.W. 4610, 4614 (1975). The suggestion that the court should not act because the legislatures have waived immunity in certain areas has not been adopted. The courts read such statutes as meaning only what they say: that in the areas indicated there shall be no governmental immunity, but it is left to the court to decide whether it should adhere to its own rule of immunity in other areas.[15]

In summary, the sovereign stands now before this Court relying upon a defense which is an historical anachronism and has no rational support. The total abolition of sovereign immunity, and replacement of it by adoption of a rule subjecting the Government to the same liabilities to which private citizens are subjected, will be ordered soon by this Court. This Court undoubtedly will elect very shortly to follow the lead of the California Supreme Court and many other State Supreme Courts in holding:

> "Only the vestigial remains of such governmental immunity have survived; its requiem has long been foreshadowed. For years the process of

[14]*Muskopf v. Corning Hosp. Dist., supra,* 218.

[15]*Id.*, 218-19.

erosion of governmental immunity has gone on unabated. The Legislature has contributed mightily to that erosion. The courts, by distinction and extension, have removed much of the force of the rule. Thus, *in holding that the doctrine of governmental immunity for torts for which its agents are liable has no place in our law we made no startling break with the past but merely take the final step that carries to its conclusion an established legislative and judicial trend.*"[16] (Italics added).

V

Tuna Corporation Can Sue the United States Under the SIA as Amended in 1960.

A. Background of the SIA and PVA.

The SIA and PVA are illustrations of Congress' discontent with the judicially-created doctrine of sovereign immunity. In 1920 Congress sought to relax that doctrine by passing the SIA so as to authorize suits against the United States for damage caused by its merchant vessels.[17] Aliens were not placed under any disability to sue under the SIA. In 1925, Congress, in the PVA, authorized suit against the United States for damage caused by its public vessels.[18] The PVA included the so-called reciprocity clause, which was

[16] *Id.*, 221.

[17] The Act (46 U.S.C. 72) provided:
"in cases where if such vessel were privately owned or operated . . . a libel in personam may be brought against the United States . . . *provided that such vessel is employed as a merchant vessel* . . ." (Italics added).

[18] The Act (46 U.S.C.A. 781) provided:
"A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States for damages caused by a *public vessel* of the United States . . ." (Italics added).

specifically limited in application to the PVA.[19] The reciprocity clause did not then apply, and never has applied, to actions prosecuted under the SIA.

In 1960 Congress broadened the coverage of the SIA by providing in patently plain and unequivocal language: "In cases where if such vessel were privately owned or operated . . . or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States . . ." (46 U.S.C. 742).

The Government concedes—indeed it has no choice —that the SIA as amended "could be read to encompass suits against the United States regarding any type of vessel, including "public vessels'." (Gov. Br. 17). Any reasonable person reading the amended SIA surely would agree with the Government, as the language admits of no other interpretation. The Government argues, however, that Congress really could not have intended what it said and that, despite its broad language, Congress intended to exclude damage caused by public vessels from coverage of the SIA. It is argued this Court should imply such an exception.

The Government position concerning legislative intent is not accurate. It is quite true the legislative history shows a very substantial concern over uncertainties concerning the jurisdiction of the court of claims and the district courts and a Congressional desire to clarify

[19] The reciprocity clause (46 U.S.C. 785) provided:
"No suit may be brought *under Sections 781-790* (italics) [PVA] of this title by a national of any foreign government unless it should appear to the satisfaction of the Court in which suit is brought that said government under similar circumstances allows nationals of the United States to sue in its courts." (Italics added).

this, and to take the court of claims out of the admiralty business. But the legislative history reflects that Congress was concerned, also, about uncertainty over the merchant-public vessel distinction between the PVA and SIA. It is observed in the Senate Report on the bill that: "A substantial portion of the jurisdiction uncertainty in this area is attributable to confusion in establishing whether a vessel is a 'merchant vessel' or a 'public vessel' "[20] The Senate Report referred also, to *Calmar S.S. Corp. v. United States,* 345 U.S. 446 (1952) as an illustration of problem it wished to correct.[21] In that case the District Court held that a privately owned vessel operated for the government was a merchant vessel within the SIA, the Court of Appeals reversed holding it was a public vessel under the PVA, and this Court reversed again holding it was after all a merchant vessel. Lurking behind the uncertainty concerning the merchant-public vessel distinction and the pointless litigation concerning it was the very real possibility, pointed out at the time by the leading text on maritime law, that it could well happen "that a ship, though not susceptible of being treated as a 'public' vessel, would not pass the test of employment as a 'merchant vessel' and so would fall between the Acts."[22] Congress plainly did not desire this to occur and, further, intended to put a stop to pointless litigation as to whether a ship was a public or merchant vessel. The solution adopted by Congress was simply to abolish the distinction by making the United States

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[20]S. Rep. No. 1894, 86 Cong. 2d Sess., 1960 U.S. Code Cong. & Adm. News, 3583, 3584.

[21]*Id.*, 3584-85.

[22]G. Gilmore and C. Black, *The Law of Admiralty* 775 (1st ed. 1957).

liable to the same extent as any private shipowner. Jurisdiction over this liability was placed under the SIA. There is absolutely nothing in this legislative history, despite the Government's assertion, indicating Congress intended the merchant-public vessel distinction to persevere beyond 1960.

That Congress desired in adopting the 1960 amendment that all maritime claims, including damage caused by public vessels, to be cognizable under the SIA, is confirmed by a Senate Report of August 17, 1972. That report states that the purpose of the 1960 amendment was to extend jurisdiction under the SIA "to the *full range* of admiralty cases which might have been maintained had a private person or property been involved rather than the Government or its agents and employees or property." (Italics added). S. Report No. 92-1079, 92d Cong., 2d Sess. 1972 U.S. Code Cong. and Adm. News, 3129, 3134.

This Court, in *Amell v. United States,* 384 U.S. 158, 164 (1966), an action under the SIA, commented upon the elimination of the merchant vessel limitation in the SIA and the legislative history of the Act, noting:

> "In 1960, Congress addressed itself to the jurisdictional overlap between the Tucker Act and the Suits in Admiralty Act. Its major aim was to empower the Court of Claims to transfer suits to the district courts when the latter had exclusive jurisdiction over them . . . *Simultaneously Congress abolished the distinction between public and merchant vessels, a matter which had sorely confused attorneys and had caused misfilings in the past.*" (Italics added).

One of the foremost experts on maritime law and actions under the SIA and PVA, Norris, has commented:

> "The intent of the Suits in Admiralty Act is to impose upon the United States the same liability—apart from seizure or arrest under a libel in rem—as is imposed by the admiralty law on the private shipowner."[23]

Even the United States, when to its advantage, admits the SIA as amended was intended as the exclusive remedy for all admiralty claims against the United States. For example, in *Tankrederiet Gefion A/S v. United States,* 451 F.Supp. 83, 84 (E.D. Mich. 1964): *"The Government also argues that Congress intended to make it perfectly clear by such amendment that the Suits in Admiralty Act was to provide the exclusive remedy, not merely for admiralty claims involving Government vessels, but for all admiralty claims against the United States.* 1960 U.S. Code Cong. and Adm. News, p. 3585." (Italics added). In *J. W. Peterson Coal & Oil Co. v. United States,* 323 F.Supp. 1198, 1204 (N.D. Ill. 1970): "The Government contends that by the inclusion of the words 'or if a private person or property were involved' *Congress intended to include all maritime torts within the Suits in Admiralty Act* . . ." (Italics added). In *Roberts v. United States,* 498 F.2d 520, 525 (9th Cir. 1974), cert. den. December 15, 1974 (No. 74-368) the Court of Appeals concluded, as the Government contended:

> "The addition of the phrase 'or if a private person . . . were involved' has been interpreted by a

[23]1 M. Norris, *The Law of Maritime Personal Injuries 3rd,* 339 (3rd ed. 1975).

> majority of courts as a legislative attempt to bring *all maritime torts asserted against the United States within the purview of the SIA."*[24] (Italics added).

The absurdity of the Government's argument that Congress inadvertently adopted broad language which included all maritime torts under the SIA as amended, is obvious when attention is called to the fact that the Civil Division of the Justice Department collaborated with the Maritime Administration in the drafting of this Act and specifically approved it.[25] If the Justice Department, with all of its experienced counsel and expertise concerning the SIA and PVA, and after careful study of the Acts, had intended damage caused by public vessels to be excluded from the Act, doesn't it stand to reason it would have provided so in the Act it co-authored? The reason that it did not do so is that the Justice Department plainly understood Congress' intent to abolish the merchant public vessel distinction once and for all.

In summary, the plain language of the Act admits of only one interpretation, *i.e.,* that claims for damage caused by public vessels, and all other maritime torts, are cognizable under the SIA. The legislative history confirms this conclusion in that it reveals concern over interminable disputes about the public-merchant vessel distinction, and a resolve to end such disputes. This Court previously has so interpreted the Act and its legislative history. Even the Government itself has repeatedly argued in the past that Congress' intention was to place all maritime torts under the SIA.

[24]For a further example of the Government's understanding that all maritime torts now lie under the SIA as amended, see: *T. J. Falgout Boats, Inc. v. United States,* 361 F.Supp. 838, 842, affirmed 508 F.2d 855, petition for cert. filed March 22, 1975 (No. 74-1215).

[25]S. Report No. 1894, *supra,* 3591, 3592.

B. Other Judicial Interpretations of the 1960 Amendment to the SIA.

The view that damage caused by public vessels, as well as all other liability for maritime torts, is included in the SIA has been shared by the Second, Fourth, Fifth and Ninth Circuit Courts of Appeal, and no circuit has taken a contrary view.

The Second Circuit in *Ira S. Bushey & Son, Inc. v. U.S.*, 398 F.2d 167 (2nd Cir. 1968) so held. There, a seaman carelessly flooded a drydock, as a result of which a Coast Guard (public) vessel in the drydock listed and damaged the drydock. The District Court held there was no coverage under the PVA because the damage was not "caused" by the public vessel but was caused instead by the seaman. The Court of Appeals reversed on this ground, holding that the damage was caused by the public vessel. But the Second Circuit added the issue was of little importance since, irrespective of whether or not the claim was cognizable under the PVA, it was cognizable (even though the damage was caused by a public vessel), under the SIA.

The Fourth Circuit reached the same result in *United Philippine Line, Inc. v. Submarine USS DANIEL BOONE*, 475 F.2d 478 (4th Cir. 1973). There, a U.S. Navy submarine, a public vessel, collided with a Philippine merchant vessel near Norfolk, Virginia. The Philippine shipowner sued the United States under the PVA and SIA. The United States answered, setting up lack of reciprocity (under the PVA) as a defense and, also, filed a counterclaim against the Philippine shipowner. The District Court held the filing of a counterclaim waived the PVA reciprocity clause, and the Fourth Circuit affirmed on that point. The Court of Appeals

did not specifically rule as to whether the claim for damage caused by a public vessel would lie under the SIA as amended, but did indicate that if called upon to decide the issue, it probably would rule in favor of the Philippine shipowner. The Court stated:

> "Section 2 of the Suits in Admiralty Act, 46 U.S.C.A. 742, as amended in 1960, would apparently allow such a suit if the section is given a literal interpretation. A literal interpretation of a statute waiving sovereign immunity is generally required. Gulf Oil Corp. v. Panama Canal Co., 407 F.2d 24, 28 (5th Cir. 1969)."[26]

The Fifth Circuit considered a closely-related issue in *De Bardeleben Marine Corp. v. United States*, 451 F. 2d 140 (5th Cir. 1971). There an action for negligent misrepresentation was filed against the United States under the SIA for damages resulting from a careless error appearing in a Government chart. Since the damage was not caused by a merchant vessel, there was no jurisdiction under the SIA prior to 1960 over such a cause. The Government argued there, as it does here, the 1960 amendment to the SIA was intended only to facilitate transfer of cases between the district courts and the Court of Claims and to clarify jurisdictional uncertainties. The Government there, as here, referred to the legislative history of the amendment and argued Congress did not intend to further waive sovereign immunity under the SIA and that it was impermissible for the Court to read in any such purpose. The Court, in overruling the Government's contentions, declared:

> "We reject these contentions. The words of the statute, its legislative history, the liberal approach

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[26] *United Philippine Lines, Inc. v. Submarine USS DANIEL BOONE, supra,* 480 n.5.

in interpreting waivers of immunity, and the senseless absurdities which would result belie the narrow reading that the Government would give to the new (1960) Section 2 of SIA."[27]

The Ninth Circuit in this case, reported at 499 F.2d 774 (9th Cir. 1974), as well as in *T. J. Flagout Boats, Inc. v. United States, supra,* and *Roberts v. United States, supra,* aligned itself with Second, Fourth and Fifth Circuits in holding that the 1960 amendment to the SIA substantially broadened the coverage of the SIA to include all maritime torts. The Government's argument before this Court in behalf of a restrictive interpretation of the SIA, accordingly, has been rejected by every court of appeal to which it has been presented.

The restrictive interpretation of the SIA urged by the Government likewise has been rejected by the majority of district courts which have considered it.[28]

In view of the foregoing, it is obvious there is near unanimous judicial authority rejecting the Government's claim that the SIA should now be restrictively construed so as not to include damage caused by public vessels and all other maritime torts. This weight of judicial opinion is soundly based on the unequivocal language of the Act itself, its legislative history, and even upon the broad interpretation of it many times urged by the Government.

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[27] *De Bardeleben Marine Corp. v. United States, supra,* 145-46.

[28] See *Richmond Marine Panama, S.A. v. United States,* 350 F.Supp. 1210 (S.D.N.Y. 1972); *Pacific Northwest Bell Telephone Co. v. United States,* 378 F.Supp. 297 (W.D. Wash. 1974); *Tankrederiet Gefion A/S v. United States, supra; Utzinger v. United States,* 246 F.Supp. 1022 (S.D. Ohio, 1965); *Tebbs v. Baker-Whitely Towing Co.,* 227 F.Supp. 656 (D. Md. 1964); and *Beeler v. United States,* 224 F.Supp. 973 (W.D. Pa. 1964), rev'd other grounds, 338 F.2d 687.

C. If There Is Any Doubt Concerning Proper Construction of the SIA, It Should Be Broadly and Liberally Construed in Favor of Innocent Victims of Government Negligence.

This principle was explained in *Gulf Oil Corp. v. Panama Canal Co.,* 407 F.2d 24, 28-9 (5th Cir. 1969), where it is noted:

> "In the structure of the Suits in Admiralty Act, 46 U.S.C.A. §741 et seq., the Public Vessels Act, 46 U.S.C.A. §781 et seq., and the Federal Tort Claims Act, 28 U.S.C.A. §1346(b), which expose the government in all of its sovereign glory to almost unlimited liabilities comparable to private parties, the approach is to construe the waiver sensibly, naturally, which means most of the time, literally. Although repeated expressions do not daunt the sovereign's representatives in dragging out the old markers of this ancient shibboleth, they are plain enough to read and heed. '[W]aivers by Congress of governmental immunity from suit should be liberally construed in the case of federal instrumentalities * * * *R.F.C. v. J.G. Menihan Corp.,* 1941, 312 U.S. 81, 84, 61 S.Ct. 485, 487, 85 L.Ed. 595, 598 [W]e think Congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation.' *Canadian Aviator, Ltd. v. United States,* 1944 324 U.S. 215, 222, 65 S.Ct. 639, 643, 89 L.Ed. 901, 907. There is to be no niggardly construction for 'when Congress authorized federal instrumentalities of the type here involved to "sue and be sued", it used those words in their usual and ordinary sense.' *F.H.A. v. Burr,* 1940, 309

U.S. 242, 246, 60 S.Ct. 488, 491, 84 L.Ed. 724, 279."

As stated in *De Bardeleben Marine Corp. v. United States, supra,* 146:

"Finally, any such [restrictive] reading is out of step with that given to similar restrictive efforts in *Rayonier,* note 15, supra; *United States v. Muniz,* 1963, 374 U.S. 150, 83 S.Ct. 1850, 10 L.Ed. 2d 805; *Indian Towing Co. v. United States,* 1955, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48. No better way to end this discussion can be found than these words from *Rayonier,* supra. 'There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it.' (352 U.S. at 320, 77 S.Ct. 374), quoted in *Muniz,* supra (374 U.S. at 166, 83 S.Ct. at 1859).

"The tide of history is running clearly against the concept of sovereign immunity. The disfavor into which the doctrine has fallen was observed as far back as *Keifer & Keifer v. Reconstruction Finance Corporation,* 1939, 306 U.S. 381, 50 S. Ct. 516, 83 L.Ed. 784. In *Gulf Oil Corp. v. Panama Canal Co.,* 5 Cir., 1969, 407 F. 2d 24, this Court pointed out that the assault upon the citadel of immunity continues presently apace. *Any doubts as to its waiver therefore are to be resolved against the sovereign.*" (Italics added).

The Government's only response to the undeniable doctrine of favoring waivers of sovereign immunity is reliance upon the canon of construction that repeal by implication is not favored. The Government overlooks

that this canon has no application for the reason that where, as here, a later act covers the whole subject of the earlier one, the later act controls. *Bank of New York v. Philippine Islands,* 296 U.S. 497, 503 (1935). Parrying with the all too numerous canons of construction, many of which are conflicting in any given situation, is not appropriate when the words used by Congress are unambiguous.[29] Tuna Corporation respectfully submits, further, that if there were any ambiguity, which there is not, the one overriding canon of construction, and it has been emphasized again and again by this Court, is that waiver of immunity statutes should be liberally and literally construed to favor innocent victims of government negligence.

D. The Government's Policy Reasons for Favoring Narrow Construction Are Lacking in Merit.

The Government argues that unless a narrow construction of the SIA is made, naval officers and crew members will be subpoenaed and cases will be pushed to trial, all of which will seriously prejudice the security of naval operations.[30] The Government overlooks that federal courts have broad discretion over subpoenas and trial dates and to judicially stay actions where appropriate. Plainly no court would permit action which would harm naval operations.

The Government argues that prejudgment interest is recoverable under the SIA, whereas it is not under the PVA, and that if permitted to sue under the SIA, Tuna Corporation may recover $250,000 in interest.[31]

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[29]*Dist. of Columbia Nat. Bank v. Dist. of Columbia,* 348 F. 2d 808, 809 (D.C. Cir. 1965).

[30]Gov. Br. 22.

[31]Gov. Br. 23.

Tuna Corporation wishes to emphasize that prejudgment interest is discretionary under the SIA and will not be awarded except where it is equitable,[32] and this rule, incidentally, prevails in all collisions involving private shipowners.[33] In short, equity will be done and the Government can hardly object to this, especially because it frequently collects prejudgment interest from private shipowners.

The Government argues, further, that to construe the SIA as Tuna Corporation contends, *i.e.*, for it to include all maritime torts, will create an "irrational statutory scheme".[34] Nothing could be less correct. The simplest statutory scheme of all is to provide, as Congress has done, that the Government shall henceforth be liable to the same extent as any private shipowner. The Government position, if adopted, on the other hand, would preserve the public-merchant vessel and resulting jurisdictional uncertainty, as well as the possibility that certain Government ships may be neither public or merchant. The Government interpretation will reinstitute the irrational statutory scheme Congress specifically sought to correct.

VI

Tuna Corporation Can Recover Under the PVA, in Any Event, Since It Is an American Shipowner.

Admiralty courts disregard the corporate entity and fix the rights and obligations of shipowners according to the citizenship of the vessels owner's shareholders. In *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306

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[32] *Richmond Marine Panama, S.A. v. United States*, 350 F. Supp. 1210, 1221 (S.D.N.Y. 1972).

[33] *Dyer v. National Steam Nav. Co.*, 118 U.S. 507, 519 (1886).

[34] Gov. Br. 8.

(1970) the admiralty practice of disregarding the legal state of incorporation was stated. In that case a seaman sued a Greek corporation which owned the vessel on which he has been employed when injured. It was shown that 95% of the stock of the Greek Corporation which owned the vessel was owned by a Greek citizen who resided permanently in the United States. The Court held that it would disregard the Greek corporation and treat the owner as American due to the residency here of the principal stockholder and his control of the corporation from the United States. The Court declared:

> "If . . . the liberal purposes of the Jones Act are to be effectuated, the facade of the operation must be considered as minor, compared with the real notion of the operation and a cold objective look at the actual operational contacts that this ship and this owner have with the United States." (p. 310).

And, as stated in *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 442 (2nd Cir. 1959), cert. den. 357 U.S. 1000:

> "Although appellant contends otherwise, the practice in this type of case of looking through the facade of foreign registration and incorporation to the American ownership behind it is well established. *Gerradin v. United Fruit Co.*, 2d Cir. 1932, 60 F. 2d 927, cert. den. 287 U.S. 642, 53 S.Ct. 92, 77 L.Ed. 456; *Carroll v. U.S.*, 2d Cir. 1943, 133 F. 2d 690; *Zielinski v. Empresa Hondurena de Vapores*, S.D.N.Y. 1953, 113 F. Supp. 93 . . ."

The cases above cited concerned Jones Act claims. So far as Tuna Corporation knows, this is the first time this issue has been raised under the Public Vessels Act, but the same result logically follows because it is settled that the Public Vessels Act, like the Jones Act, is to be construed liberally and applied in favor of claimants. See, *Orion Shipping & Trading Co. v. U.S.*, 247 F.2d 755, 757 (9th Cir. 1957).

Tuna Corporation is an alien only insofar as its state of incorporation is concerned. It was formed by Americans pursuant to Congressionally-adopted national policy of encouraging investment in friendly less-developed nations. See S. Report No. 1881, 87th Cong., 2d Sess. 1962 U.S. Code and Admin. News, 3371. All of its funds were furnished by Americans; 99% of its stock was owned by Americans, who pay United States taxes; all of its activities were directed and controlled by Americans from America; its vessel was purchased and outfitted in the United States; and the loss occurred in American waters. Most importantly, the million dollar loss occasioned by the sinking of the ORIENT has been borne by American citizens.

It is respectfully submitted that under the law established by this Court, Tuna Corporation should be treated as an American shipowner and should not be barred from recovering under the PVA by reason of the reciprocity clause.

VII

Even if Tuna Corporation Were Treated Under the PVA as a Philippine Shipowner, Which It Should Not Be, the Reciprocity Clause Would Be No Bar to Recovery Because It Is Unconstitutional.

Even if this Court concludes that Tuna Corporation can sue only under the PVA, and that Tuna Corporation should be treated as a Philippine shipowner, Tuna Corporation still has standing to sue under the PVA since the reciprocity clause therein denied equal protection of the laws to Filipinos and, accordingly, is unconstitutional.

Graham v. Richardson, 403 U.S. 365 (1971) is the leading case at this time concerning extension of equal protection to aliens. It is there emphasized that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. "Aliens as a class are a prime example of 'discrete and insular' minority [citation omitted] for whom such heightened judicial solicitude is appropriate." (372).

Just as it is unconstitutional to discriminate without any substantial justification against aliens as a group, it is likewise unconstitutional to discriminate against certain groups of aliens while according equal protection to others. In *Sei Fujii v. State of California*, 38 Cal.2d 718 (1952) the California Supreme Court reviewed the constitutionality of a state statute which prohibited ownership of land by aliens ineligible for citizenship under our naturalization laws, but permitted

other aliens to own land. In declaring the Act to be unconstitutional, the Court observed (733):

> ". . . there can be no justification for a classification which operates to withhold property rights from some aliens, not because of anything they have done or any beliefs they hold, but solely because they are Japanese [who were not eligible for citizenship] and not French or Italian [who were eligible for citizenship]."

What overriding legislative justification is there to permit discrimination against Filipinos of the most onerous nature, *i.e.*, the taking and destroying of their property without just compensation? There is none! Indeed, the basic inequity of the rule is astounding when it is recognized that Tuna Corporation and other Philippine companies can be, and are, sued by the United States if they damage a United States public vessel. See *United Philippine Line v. United States, supra.* Not only can the United States sue Philippine citizens in the United States, but it can, if it wishes, sue them in the Philippine courts. Philippine Civil Code, Sections 2176, 2180. There may be some justification for refusing a remedy to the Philippine Government if it cannot be sued, but there is no justification whatsoever for denying an individual Philippine citizen the right to sue the United States when the United States can and does sue him.

The "reciprocity" clause plainly fails all tests of basic fairness and cannot withstand close judicial scrutiny. In light of equal protection, it is patently unconstitutional.

VIII

Conclusion.

For the foregoing reasons, Tuna Corporation respectfully submits that the judgment of the Court of Appeals should be affirmed. The United States should not be permitted to negligently destroy property of innocent parties and then deny them a day in court.

Respectfully submitted,

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